Filed 10/7/10 P. v. Rada CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JIMMY SUPNET RADA, Defendant and Appellant.	A124766 (Contra Costa County Super. Ct. No. 05-080611-7)

A jury convicted appellant Jimmy Supnet Rada of two felonies—evading a police officer by driving in a reckless manner (count one - Veh. Code,[1] § 2800.2, subd. (a)) and evading a police officer by driving in the direction opposite to that which traffic is lawfully moving (count two - § 2800.4)—and three misdemeanors—driving under the influence of any alcoholic beverage or drug (count three - § 23152, subd. (a)); driving with a blood-alcohol level of 0.08 percent or more (count four - § 23152, subd. (b)); and resisting, obstructing or delaying a police officer (count five - Pen. Code, § 148, subd. (a)(1)). He was sentenced to five years in state prison for the felonies and given six-month jail sentences with credit for time served for the three misdemeanors. Appellant contends that the prosecutor committed misconduct during the examination of a witness, and that the trial court erred by failing to stay either count three or four pursuant to Penal Code section 654. The Attorney General concedes that the abstract of judgment should be modified to stay the sentence on count four. We likewise find

[1] Unless otherwise noted, all statutory references are to the Vehicle Code.

appellant's latter contention meritorious and modify the judgment accordingly, affirming it in all other aspects.

I. FACTS

On the evening of February 24, 2008, Oakley Police Officer David Riddle arrived near the intersection of Main and Second Streets in Oakley to assist a traffic enforcement stop. Upon arrival, he was provided with the description of a black compact car that Contra Costa County Deputy Sheriff James Lambert, the initial officer on scene, surmised to be involved in a recent traffic accident. After following the direction that Deputy Lambert provided, Officer Riddle came into contact with a car matching the earlier description and attempted to stop the vehicle. The driver of the car, appellant, failed to pull over and proceeded to break numerous traffic laws until ultimately turning into the parking lot of a nearby apartment complex. Appellant exited the car and fled on foot into the complex. Officer Riddle caught up with him and took him into custody.

At trial, during direct examination of Officer Riddle, the prosecutor asked the officer to describe the area where appellant was apprehended. After he described the apartment complex, the prosecutor asked: "Did you know whether or not this area was a high crime area?" Counsel for appellant objected to the question as irrelevant, but the court overruled the objection. Officer Riddle continued, stating "I've heard in the past that there are gangs that hang out in that area." Again, counsel for appellant objected to the answer as irrelevant and calling for hearsay, and moved to strike it. The court sustained the objection and struck the testimony. The prosecutor followed with the question: "In the abstract or in general, what was known to you when you ran into that apartment complex? Did you know whether or not this was an area associated with crime?" Appellant's counsel objected to the question as leading. Overruling the objection, the court asked: "Did you or didn't you know that it was associated with crime?" Officer Riddle repeated: "I've heard of gangs that come from there," and again, appellant's counsel objected. Officer Riddle clarified that he had "no personal experience dealing with crime in that particular apartment complex." The court struck Officer Riddle's first answer, but allowed the second response to remain.

II. DISCUSSION

A. *Alleged Prosecutorial Misconduct*

Appellant argues that the prosecutor engaged in misconduct when she asked Officer Riddle whether he knew if the area where appellant was arrested was a "high crime area." Appellant concedes that defense counsel failed to make a timely objection based on prosecutorial misconduct. However, he contends that the issue is not forfeited because he correctly challenged the question as eliciting irrelevant hearsay. Alternatively, appellant argues that we must consider the issue of ineffective assistance of counsel if we reject the forfeiture analysis.

1. *Governing Law*

The applicable standards regarding prosecutorial misconduct are well recognized. In order to preserve an issue on appeal, trial counsel must make a timely objection. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) The California Supreme Court has noted that "[a]s a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*Ibid.*) Furthermore, when an appellant's claim focuses upon comments made by the prosecutor before the jury, the issue is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*Ibid.*)

Assuming that misconduct occurred and the issue was properly preserved on appeal, we look to the following standards; for prosecutorial misconduct to constitute a violation of the federal Constitution, the misconduct must so infect the trial with unfairness as to make the resulting conviction a denial of due process. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.) "Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' [Citations.]" (*People v. Benavides* (2005) 35 Cal.4th 69, 108.) The ultimate question is this: Had the prosecutor refrained from the misconduct, is it

reasonably probable that a defendant would have received a more favorable result? (*People v. Haskett* (1982) 30 Cal.3d 841, 866.)

2. *Appellant's Prosecutorial Misconduct Claim Is Forfeited*

Appellant's counsel objected to the prosecutor's line of questioning as irrelevant hearsay; however the standard set forth in *People v. Samayoa, supra,* 15 Cal.4th 795 requires a more specific objection in order to preserve the issue of prosecutorial misconduct for appeal. In the case at bar, appellant's claim is deemed waived by his failure to properly identify the objection as prosecutorial misconduct and failing to request an admonition. Further, the record fails to disclose a basis for applying any exception to the general rule requiring both an objection and a request for a curative instruction.

3. *Counsel's Failure to Lodge a Proper Objection Was Not Ineffective Assistance*

Alternatively, appellant argues that if we conclude his claim is forfeited, reversal nonetheless is required because trial counsel rendered ineffective assistance for failing to lodge a proper objection. The standard for establishing ineffective assistance of counsel is well settled. In *People v. Pope* (1979) 23 Cal.3d 412, 425, the California Supreme Court set out a two-step test for determining the adequacy of counsel: "[The defendant] must show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates. In addition, [the defendant] must establish that counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense." Thus, appellant's ineffective assistance of counsel claim will prevail only if he can establish deficient performance, i.e., representation below an objective standard of reasonableness, and resultant prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216, 217.) Tactical errors generally are not deemed reversible; and counsel's decisionmaking must be evaluated in the context of the available facts. (*Strickland v. Washington* (1984) 466 U.S. 668, 690.) We turn directly to the question of prejudice.

Appellant's counsel objected to the questioning on hearsay and relevancy grounds. The court struck Officer Riddle's response from the record and instructed the jury twice

not to consider stricken testimony. We presume that the jury followed the court's instructions and disregarded the comments. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Furthermore, the prosecutor did not reference the stricken testimony during closing argument. Because the comments were already stricken from the record, nothing more would have been gained if counsel also interjected a prosecutorial misconduct objection. For these reasons, appellant cannot demonstrate prejudice.

4. *No Prosecutorial Misconduct Occurred at Trial*

Even considering the merits of the claim, the prosecutor's line of questioning did not rise to the level of misconduct. Appellant asserts that the prosecutor's examination of Officer Riddle regarding the location of his capture and arrest was designed only to appeal to the passions of the jury and therefore should be deemed inappropriate. Appellant also argues that the prosecutor knew or should have known that the challenged evidence was inadmissible when the prosecutor asked Officer Riddle about his knowledge of the criminal activity present at the arrest location. However, misconduct is not present merely because a prosecutor's question to a witness elicited an inadmissible response. (*People v. Chatman* (2006) 38 Cal.4th 344, 379-380.) Prosecutorial misconduct is present when a prosecutor's question is inherently likely to elicit an improper response, and there was evidence that the prosecutor asked the question with the intent to elicit such a response.

Here, there is nothing in the record indicating the prosecutor knew that Officer Riddle's answer would be deemed inadmissible. Furthermore, appellant's attempt to classify the prosecutor's rephrased question to Officer Riddle as a conscious effort to elicit testimony previously struck as hearsay is unpersuasive. The prosecutor was merely trying to rephrase the question in order to gain an admissible answer. It is clear from the record that when Officer Riddle had no personal knowledge of the topic the prosecutor moved to a different topic.

5. *The Prosecutor's Conduct Was Harmless*

Assuming for the purposes of argument only that prosecutorial misconduct occurred, any misconduct was harmless. Where the purported prosecutorial misconduct

is based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the prosecutor's questions in an improper or erroneous manner. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) As noted earlier, the prosecutor's questioning of Officer Riddle about the level of criminal activity was brief and stricken from the record. The court also instructed the jury twice to disregard all stricken testimony. We presume that the jury followed these instructions. (*People v. Sanchez, supra,* 26 Cal.4th at p. 852.) Thus, it is not reasonably probable that appellant would have received a more favorable result absent any such misconduct.

B. *Sentencing Error*

At sentencing the trial court imposed a six-month concurrent jail term as to both count three, driving under the influence of any alcoholic beverage or drugs (§ 23152, subd. (a)), and count four, driving with a blood-alcohol level of 0.08 percent or more (§ 23152, subd. (b)). Appellant asserts that the sentence as to count four should have been stayed under Penal Code section 654, subdivision (a). The Attorney General agrees that the statute applies and joins appellant in asking the court to correct the sentence.

Penal Code section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." Here, imposing duplicate jail terms for counts three and four constituted multiple punishments for the same act or course of conduct—a single instance of drunk driving—in violation of Penal Code section 654. We affirm appellant's convictions but order the matter remanded to correct the sentence by staying the six-month jail term imposed.

III. DISPOSITION

We affirm the judgment and remand for the purpose stated above.

_____
Reardon, J.

We concur:

_____
Ruvolo, P.J.

_____
Sepulveda, J.